Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	))))))))	MB Docket No. 05-311

REPLY COMMENTS ON BEHALF OF: THE ASSOCIATION OF WASHINGTON CITIES; THE WASHINGTON STATE ASSOCIATION OF COUNTIES; THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; THE CITIES OF EVERETT, KENT, LACEY, OLYMPIA AND TUMWATER, WASHINGTON; THURSTON COUNTY, WASHINGTON; THE RAINIER COMMUNICATIONS COMMISSION AND THE JERSEY ACCESS GROUP

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SUMMARY

The Association of Washington Cities; the Washington State Association of Counties; the Colorado Communications and Utility Alliance; the Cities of Everett, Kent, Lacey, Olympia and Tumwater, Washington; Thurston County, Washington; the Rainier Communications Commission[1] and the Jersey Access Group (referred to as the "Local Governments") appreciate the opportunity to submit these Reply Comments in these important proceedings. After review of the comments filed in this Docket, we are convinced that there is neither a broad spectrum of competent evidence, nor clear legal authority for the Commission to adopt its proposed national rules regulating cable franchising.

In these Reply Comments, the Local Governments will focus on issues involving the lack of adequate support and justification advanced for the proposed rules, additional information the Commission should consider, and the public interests at stake in this proceeding.

[1] The Rainer Communications Commission did not join with the Local Governments in the initial Comments but joins in these Reply Comments. RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and nine municipalities located within Pierce County. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

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On behalf of the Association of Washington Cities ("AWC"); the Washington State Association of Counties ("WSAC"); the Colorado Communications and Utility Alliance ("CCUA"); the Cities of Everett, Kent, Lacey, Olympia and Tumwater, Washington; Thurston County, Washington; the Rainier Communications Commission ("RCC") and the Jersey Access Group ("JAG") we submit these Reply Comments in opposition to the Federal Communications Commission's ("Commission's") Second Further Notice of Proposed Rulemaking ("FNPRM") regarding cable-related franchise considerations.

I. INTRODUCTION

The Commission's proposals are a solution in search of a problem. Of the thousands of comments filed in this FNPRM, only **three** filings represent the views of industry whereas the remaining comments represent the voices of individuals, local government and Access entities across the nation. The major cable companies, Comcast, Charter, AT&T, and Frontier did not see the need to comment in support of the FNPRM in contrast to the multitude of local governments and their citizens who oppose these changes. Instead, with the exception of Verizon, only the cable trade associations, the NCTA-the Internet & Television Association ("NCTA") and the American Cable Association ("ACA"), supported the Commission's proposals. When the cable industry has sought regulation in the past cable operators have been active and vocal but here they are largely silent. The absence of cable operator participation in the Comments phase of this docket emphasizes the arguments of all local governments – the proposed regulation by the Commission is not necessary. The arms-length franchise negotiations coupled with existing law is sufficient to ensure a balance between the cable operators and local governments.

The cable trade association comments do not adequately support the rules proposed in the second FNPRM. The NCTA and ACA focus on the oft-used and little supported argument that once again, local governments are standing in the way of deployment and the provision of affordable service and that the Commission must step in to pre-empt local franchising authority. However, these arguments mischaracterize local government practices,[2] and the policies suggested by the cable trade associations would not adequately serve the public interest.

II. ARGUMENT

A. The Commission Should Not Disturb the Positive Relationships Between Industry and the Local Governments.

Local governments have longstanding relationships with cable operators and have worked to develop positive practices in partnership with industry. The ACA acknowledged in its comments that that its members have mostly positive relationships and experiences with local

[2] For example, see the Reply Comments of the City of Richland, Washington rebutting the NCTA's erroneous allegation that it stockpiled and misused PEG fees.

franchising authorities ("LFAs"): "They have longstanding relationships and extensive experiences with LFAs, and, as a rule, these operators find these relationships to be harmonious and productive."[3] The ACA acknowledges that what local governments have been telling the Commission for years – the relationships between local governments and industry are positive and workable for all parties. There is no need for the Commission to change that dynamic now.

B. <u>RCC's Experience as a PEG Provider Exemplifies the Value of Local Programming.</u>

RCC is based in Tacoma, Washington and represents jurisdictions within Pierce County, the second-largest county in the state. More than 200,000 cable subscribers have access to its two channels, Pierce County Television and University Place TV. RCC produces programming like gavel to gavel city council meeting coverage of eight jurisdictions including the cities of Puyallup, University Place, DuPont, Fife, Sumner, Orting and Pierce County, as well as a public affairs talk show, military programming, public service announcements, and storytelling videos that explain local government public services and celebrate community events.

This content has been nationally recognized as exemplary programming. Pierce County News has been nominated for an EMMY and has also been consistently recognized by the National Association of Telecommunications Officers and Advisors ("NATOA") as one of the top government news programs in the United States.

RCC joins its colleagues here because the Commission's proposed rules would greatly impact its ability to offer valuable Public, Education and Government (PEG) programming. PEG funding comes from the franchise fees from cable operators paid to the local communities that

[3] American Cable Association Comments, Docket No. 05-311, p. 2. "They have longstanding relationships and extensive experiences with LFAs, and, as a rule, these operators find these relationships to be harmonious and productive."

RCC PEG stations represent. It shares concerns about the impact of allowing cable operators to offset franchise obligations to provide PEG channels against franchise fees. Applying the market value of the channel space and off-setting it against the cable franchise fees, would not only catastrophically affect the RCC's budget and the 11+ full time and extra hire jobs it creates, but it would also eliminate the funding that local communities receive as rent for the cable operator to use the public Rights of Way.

Valuable local public programming would also be severely limited, if not altogether eliminated. Being in the shadow of Seattle's news coverage, commercial broadcast stations rarely cover the South Puget Sound area. Pierce County has nearly one-million residents and they rely on Pierce County TV and University Place TV as their only source for local news and political coverage of their community. This funding allows RCC to provide transparency in local government and gives cities the financial resources to maintain the integrity of the public's Rights of Way.

C. Mixed Use.

The Local Governments agree with Commenter NATOA et al. that Title VI does not provide authority to the Commission to preempt "LFAs from exercising any authority over non-cable services and facilities, even where the local government is not acting as an LFA—that is, where the local government is acting under some other authority and not as the entity authorized to issue cable franchises as defined in the Cable Act. Such a conclusion, if intended, is well beyond the scope of the plain language of the Cable Act."[4] The Commission should not adopt rules to the contrary.

[4] NATOA et al. Comments, Docket No. 05-311, pp. 13-14.

Furthermore, the court's decision in *Montgomery County, Md. v. FCC* does not require adoption of the proposed rules related to mixed use. While NCTA notes that the Sixth Circuit remanded this proceeding back to the Commission on procedural grounds and thus did not hold that the Commission's conclusions were necessarily incorrect,[5] the court also did not say that the Commission's reasoning was correct. As Commenter NATOA made clear: "To the extent the FNPRM is intended to state that a preemptive version of the mixed-use rule was reviewed or sustained by the Sixth Circuit, this is inaccurate. The Commission should not rely on any asserted conclusions by the Court in Montgomery County to support a new rendering of the mixed-use rule."[6] The Commission may only adopt pre-emptory rules to the extent that it has legal authority to do so, and *Montgomery County, Md. v. FCC* bestows no such authority.

D. <u>Claims That the Proposed Rules Will Benefit Consumers Are Not Supported.</u> Verizon claims that reforming local franchising rules are necessary to slow rising costs for consumers.[7] However as another commenter has pointed out, increased competition from online video distributors is already increasing consumer welfare by infusing competition into a fast consolidating industry.[8] Verizon also contends that LFAs cost consumers money because franchise fees and in-kind services are passed on to consumers.[9] NCTA goes even further and describes franchise fees as fees paid by subscribers.[10] Characterizing the franchise fee as a

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[5] NCTA Comments, Docket No. 05-311, p. 4.

[6] NATOA et al. Comments, Docket No. 05-311, p. 16.

[7] Verizon Comments, Docket No. 05-311, p. 1.

[8] *See* The City Coalition Comments, Docket No. 05-311, p. 7. "The decline in households with access to four MVPDs was due to industry consolidation, not actions of LFAs. While the MVPD industry may be consolidating, consumers retain significant options due to the continued growth of online video distributors ("OVDs"). The Commission has expressly acknowledged that increasing competition from OVDs "may provide numerous benefits to consumers."

[9] Verizon Comments, Docket No. 05-311, p. 2.

[10] NCTA Comments, Docket No. 05-311, p. 39.

payment by subscribers distorts reality. Cable companies are permitted but not mandated under the law to pass on these costs.[11] However, LFAs do not charge consumers a franchise fee; they charge cable operators a franchise fee as compensation for the use of the rights-of-way. This distinction should not be ignored.

E. <u>The Rules Proposed by the Commission Would Impermissibly Interfere with the Bargaining Process.</u>

Despite NCTA's conclusory assertions to the contrary, cable franchise negotiations occur between parties with equal incentives to come to an amicable agreement, which is why these cable franchise agreements are completed successfully all over the country.[12] NCTA asserts that cable operators lack bargaining power because of the risk of their stranded investment.[13] However a stranded investment would mean no franchise fees for an LFA, and these fees are vital to city budgets. More importantly, refusing to allow the continuation of cable service within a community (even if it could be easily done, as incorrectly suggested by NCTA) would be cause for nearly every American to get off their couch and protest this governmental action. It is not realistic for an LFA to reject a franchise renewal and turn off cable service.

If an LFA refused to renew a franchise agreement through an informal negotiation, the time and the cost of following the Cable Act's formal renewal process is significant. This explains why the formal process is used so infrequently, and why denial of renewals rarely occur. LFAs have significant pressure upon them not to take actions which would deprive citizens of the ability to purchase cable services, so LFAs face powerful incentives to come to an

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[11] *City of Pasadena, California The City of Nashville, Tennessee and the City of Virginia Beach, Virginia,* Opinion and Order, FCC 01-289 (adopted Oct. 1, 2001).

[12] NCTA Comments, Docket No. 05-311, p. 3.

[13] NCTA Comments, Docket No. 05-311, p. 3.

agreement. The cable industry is not worried that an LFA may require that they dig up all their infrastructure, that would be absurd, politically costly to the LFA, and financially expensive to both the LFA and the cable operator. This is not a real fear. Moreover, like any contract negotiations, franchise negotiations involve numerous discussions about the give and take relating to how a cable operator can best meet cable-related community needs, taking into account the cost of meeting those needs. It is not uncommon during negotiations for parties to say 'no,' as almost every LFA has experienced. What is clear from NCTA's statements that cable operators lack bargaining power is that no one involved in the preparation of NCTA's comments has actually participated in a franchise renewal negotiation.

NCTA further suggests that the Commission should impose rules that prevent parties from waiving any limitations on franchise fees.[14] The premise of NCTA's argument is wrong. A cable operator who agrees to provide certain non-financial benefits within a franchise is not waiving a limitation on franchise fees. Rather, in an arm's length negotiation the parties have agreed that providing this benefit is mutually beneficial and reasonable. It is the cable operator's contractual right to agree to these benefits, just as it is an LFA's right to choose to reduce franchise fees to less than five percent, or even decline to require any franchise fees. To impose a restriction on the bargaining ability of the cable operators and the LFAs is an intrusion with the bargaining process between sophisticated parties.

Further, the NCTA absurdly recommends that the Commission's proposed rules should be applied retroactively. Any attempt to apply new rules to a current agreement is unenforceable and would be a Constitutionally impermissible impairment of existing contracts. A retroactive application of the Commission's rules would require the reopening of all existing franchises

[14] NCTA Comments, Docket No. 05-311, pp. 5; 59.

across the nation, because it will shift the balance of the agreements made between both parties, and the concessions both parties made in the contract negotiations. This is an outcome that neither side would prefer to see.

F. Cable Franchise Fees Were Never Intended to Relate to Rights-of-Way Management Costs.

NCTA mistakenly asserts that there is case law that a five percent cable franchise fee exceeds the costs of managing rights-of way: "as the Commission highlighted in its recent Wireless Infrastructure Order, courts have held that a five percent gross revenue fee far exceeds a locality's rights-of-way management costs."[15] The section of the Wireless Order cited by NCTA discusses state and local fees, pointing to *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla* and *TCG New York, Inc. v. City of White Plains* to support the argument that state and local fees can run afoul of section 253 and 332.[16] In the cases mentioned, a five percent gross revenue fee ran afoul of the "materially inhibits" test because the fees constituted a substantial increase in costs for the providers and would negatively affect profitability for the providers.[17] These cases do not hold that the five percent gross revenue fee exceeded a locality's rights-of-way management costs, but rather that the fees were effective prohibitions because the

[15] NCTA Comments, Docket No. 05-311, p. 23.

[16] *In the Matter of Accelerating Wireless Broadband by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (rel. Sep. 27, 2018) (hereinafter the "Wireless Order"), ¶¶ 43-44.

[17] *Municipality of Guayanilla* 450 F.3d 9,17-22 (1st Cir. 2006) "We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery." *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 77-79 (2nd Cir. 2002) "However, because the issues of whether "reasonable compensation" can include gross revenue fees and, if so, what percentage of gross revenue may be exacted are difficult and not necessary to resolve this appeal in light of the discussion which follows, we decline to reach the issue."

fees prevented the companies from being able to compete fairly in the market.[18] NCTA's argument stretches the courts' holdings far beyond what they actually say.

NCTA also contends that "Cable operators already pay more than 'fair and reasonable compensation' for their use of the public rights-of-way in the form of franchise fees."[19] However Congress determined in 1984 that a fair compensation for the use of the rights-of-way for the purpose of providing cable service can be up to five percent of cable gross revenues. Clearly, the right to occupy this limited and valuable public property for other purposes was never intended to be compensated by the provisions of the Cable Act. As NATOA's Comments cogently argue, the legislative history of the Telecommunications Act makes clear that Congress intended that cable franchise fees are not occupancy fees covering all uses of the rights-of-way.[20]

Arguments that non-cable services should be exempted from the authority of local cable franchising authority because these offerings do not impose new costs on LFAs charged with managing the rights-of-way not only continues to conflate right-of-way occupancy fees and franchise fees, but ignores the extra costs of administering non-cable equipment in the rights-of-way such as strand mounted wireless devices. After a cable system is deployed, industry activities to add facilities to the cable wiring requires verifying compliance with local safety codes, ensuring lanes of traffic are closed at the proper times and in a manner that protects public safety and imposes other regulatory and oversight costs on local governments.

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[18] *Id.*

[19] NCTA Comments, Docket No. 05-311, p. 23.

[20] NATOA et al. Comments, Docket No. 05-311, p. 24. "In any event, Congress has rejected NCTA's argument that cable franchise fees are "compensation" for purposes of Section 253. As noted above, the legislative history of the Telecommunications Act makes clear that Congress saw the five percent franchise fee in the Cable Act as compensation only for use of the rights of way for the provision of cable services over the cable system. They explicitly intended to preserve "the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees" including with respect to cable operators' telecommunications services.71 This intent is unquestionably inconsistent with NCTA's position that the cable franchise fee also compensates local governments for additional uses of the rights of way."

To the extent that NCTA suggests that LFAs should pay for facilities relocation and undergrounding through credits against a franchise fee cap, its proposal is untenable.[21] Cable operators who occupy the rights-of-way that local governments hold in trust for their citizens are subject to the same obligations as every other occupant. The primary purpose of public rights-of-way is for the safe and efficient movement of vehicular and pedestrian traffic. Other uses are secondary. For over 100 years local government-recognized police power has included the ability to require any user of the rights-of-way to relocate or place facilities underground, when in the best interests of the public health, safety and welfare. This Commission has even previously discussed the reasonableness of undergrounding and dig-once policies.[22] To make an exception granting a public subsidy to cable operators when these requirements are imposed, while electric providers, gas providers, water and sewer providers, and broadband providers remain bound by these long-standing obligations, would bestow an unequal benefit on cable operators. There is no legal authority upon which the Commission could grant such an exception benefiting the cable industry. It is outrageous that NCTA would even make this request to exempt its members from obligations that have applied to cable operators and all other rights-of-

[21] NCTA Comments, Docket No. 05-311, p. 54. "**Facilities Relocation** (Forced relocation of cable facilities (including relocation costs for PEG origination), or forced undergrounding of cable facilities, not required of other users of the rights-of-way): 1. Actual cost of relocation or undergrounding, including new fiber runs. 2. Labor. 3. Permits/License/Inspection Fees. Actual costs related to any required permitting, licenses or inspection".

[22] *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018), ¶ 152 (hereinafter the "Moratoria Order"). "For example, some "street-cut" requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote "dig once" policies 'in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit,' and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits."

way users for so many years. Surely the Commission will not propose to single out one kind of rights-of-way user for special benefits.

G. The Proposed Rules Will Not Further the Admirable Goals of Universal Service and Rural Buildout.

NCTA argues that "burdensome" conditions imposed by LFAs will hurt universal service goals and efforts to close the digital divide.[23] Without an actual quid pro quo proposal to lessen the LFAs' lawfully imposed fees on providers in exchange for increased build-out obligations, any vague appeals to the admirable goals of extending service should be dismissed as conclusory requests for tax-payer subsidies of private enterprise.

While NCTA correctly recognizes that rural areas face unique hardships in deployment of services, their assertion that overregulation harms deployment in these areas is unsupported.[24] Some commenters have already addressed in other Commission proceedings why this regulatory cross-subsidization is unlikely to occur.[25]

NCTA contends that the proposed rules "will help promote broadband investment, deployment, and innovation."[26] This statement offers no evidence that any of the proposals discussed here will actually lead to increased investment in broadband networks. Unlike other kinds of broadband networks, cable networks generally provide service throughout the entire community because the LFA has authority to impose those build out obligations. The claim that

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[23] NCTA Comments, Docket No. 05-311, p. 25.

[24] NCTA Comments, Docket No. 05-311, p. 30.

[25] *See e.g.* CCUA et al. Reply Comments, Docket Nos. 17-79 and 17-84, pp. 10-11. Smart Cities Ex Parte Letter, Sep. 19, 2018, Docket nos. 17-79 and 17-84, pp. 18-21 "Yet deployment of facilities for protected services (telecommunications and personal wireless services) and for broadband services have continued apace. Hence, the Commission relies on speculation: it suggests that if less were charged in New York, more facilities would be deployed in North Dakota."

[26] NCTA Comments, Docket No. 05-311, p. 1.

if costs are credited against franchise fees then providers will be incented to increase buildout is false. None of the industry commenters have suggested or agreed to a quid pro quo to increase capital investment or deploy networks in hard to reach areas in exchange for any of the de facto subsidies the Commission proposes. As noted in Section D *supra*, the industry also acknowledges that these preemptory rules will not actually save the industry money to be used for deployment or for any other purposes—precisely because the industry practice has always been to pass these costs on to consumers. Until the industry consents to, or the Commission imposes, such a quid pro quo, these vague comments about deployment should be ignored.

For the 34 years since the passage of the Cable Act cable operators and LFAs have worked well with the existing interpretations of what charges are included in franchise fees and what other provisions could be negotiated under the Cable Act's framework outside of the franchise fee obligation. Cable service and now the other services provided by cable operators over their cable systems, are some of the only services that are provided universally throughout each franchised territory, due to LFA build out requirements. It is surprising, to say the least, that after three decades of not objecting to these interpretations of the Cable Act, the NCTA has now come up with a claim that somehow these actions impair universal service goals.

ACA argues that the Commission's rules do not go far enough because they may exclude build-out requirements from the definition of franchise fees.[27] ACA appears to propose that any build-out requirement imposed by a LFA to the extent that it is not profitable should be charged against the LFAs' franchising fees.[28] The cable industry cannot argue on one hand that it supports universal service goals, suggesting that the Commission's proposed rules also support

[27] ACA Comments, Docket No. 05-311, p. 7.

[28] *Id.*

those goals, and then pivot to argue that build out requirements which have for years promoted universal service goals, should now be eliminated if "too costly" for the cable operator.

H. The Commission Should Not Adopt Rules That Value In-Kind Contributions at Fair Market Value.

NCTA suggests that "any in-kind obligation that is not referenced in the Cable Act must be negotiated at its fair market value, and if agreed to by the cable operator, must count towards the franchise fee cap."[29] NCTA justifies this extraordinary departure from thirty years of practice on the grounds that in-kind contributions and the "free" provision of services to communities raises costs on consumers.[30] As discussed in section D, *supra*, whether a cable company chooses to pass any regulatory fees on to consumers is a business choice.

In our experience collectively negotiating hundreds of cable franchises over the last 34 years, cable operators routinely acknowledge that they provide service to a number of parties without charge, including for example, their employees. These companies are accustomed to providing complimentary service, it does not harm their business, and it would create a windfall for them if they were permitted to start charging local governments for what has been a benefit commonly provided for years as a complimentary service.

Further as commenter Anne Arundel County, Maryland, et al., have pointed out, cable franchise operators incur no actual costs when providing content over complimentary accounts.[31] Therefore even compensation of incremental costs would be inappropriate. It would be unfair to charge LFAs fair market value where the cable operator is not paying for any content provided to these localities.

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[29] NCTA Comments, Docket No. 05-311, p. 46.

[30] NCTA Comments, Docket No. 05-311, p. 50.

[31] Anne Arundel County, Maryland, et al. Comments, Docket No. 05-311, p. 31.

There are also logistical issues with trying to value these services. As commenter the City Coalition points out, regional variations will make any true value of in-kind contributions difficult which could have potentially unfair impacts on communities.[32]

NCTA suggests that "Congress's statutory scheme applies whether or not the in-kind exactions are related to cable service, and the Commission should so clarify." [33] However even if the Commission decides to adopt rules which require in-kind contributions for non-cable services to be credited against franchise fees, cable related services such as PEG channels should not be credited against franchise fees as described in our previous comments in this docket.[34]

Finally, NCTA suggests without support that LFAs "will tend to over-consume at the cable operator's buffet, resulting in market inefficiency."[35] This unsupported assertion characterizing local governments as gluttons also ignores the public interests at stake in the communities which the local governments represent.

I. Industry Comments Lose Sight of the Public Interests at Stake in This Proceeding.

The ACA seems to suggest in its comments that cutting into its profit margins is against the public interest:

> "In addition to being compelled under the statute, the Commission's proposed treatment of "cable-related, in-kind" contributions" as franchise fees would serve the public interest. If these "in-kind" contributions are not counted as franchise fees, a cable operator faces a dilemma: either "eat" the costs or pass them along to subscribers, raising the total cost of service. Neither of these alternatives serves the public interest. If a cable operator's margins are reduced, it will have less capital to invest in deploying new plant and rolling out new services. If service

[32] *See* The City Coalition Comments, Docket No. 05-311, p. 20. "Just as no two communities are the same, no two cable systems are the same, which inevitably will lead to numerous, incompatible estimates of value, with related disparate impacts on communities."

[33] NCTA Comments, Docket No. 05-311, p. 42.

[34] AWC et al. Comments, Docket No. 05-311.

[35] NCTA Comments, Docket No. 05-311, p. 50.

> prices are raised, either consumers will suffer, or, if they migrate to another provider that is not subject to the fee, the cable operator will lose revenues."[36]

There is no public interest impact on profit margins, there is only a shareholder impact. It is inaccurate to say that because profit margins are impacted a cable operator's ability to provide service is impacted. The requirements of a cable franchise are just a handful of financial obligations that are part of a cable operator's costs of doing business. Franchise obligations are dwarfed by labor costs, costs of programming, network deployment costs, federal regulatory compliance, costs of benefits paid to employees and senior management, and many others. Eliminating or restricting the ability to require franchise benefits to a community that have existed without complaint for 34 years is simply an industry argument for local governments to subsidize the operation costs of cable operators through federal fiat. The cable associations have made no showing that these franchise considerations significantly impact their members' bottom line; indeed, they have not even shown that they nominally impact their bottom line. The silence of the industry, and the lack of evidence that these franchise considerations have a financial impact on these multi-billion dollar organizations is telling. The NCTA, ACA and Verizon failed to make a compelling argument that the public interest is negatively impacted by these franchise considerations, because in fact this negative public impact does not exist.

J. NCTA's Description of Oregon Caselaw Ignores State Judicial Authority.

NCTA takes umbrage with a recent decision of Oregon's highest court, referring to it as "wrongly decided"[37] and then criticizing Oregon local governments for their lawful acts under state law.[38] If NCTA takes issue with this decision, the proper remedy is to lobby the state

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[36] ACA Comments, Docket No. 05-311, p. 9.

[37] NCTA Comments, Docket No. 05-311, p. 26.

[38] NCTA Comments, Docket No. 05-311, pp. 26-27.

legislature to change the law, rather than accuse jurisdictions of breaking it by taking action that the state court has held to be lawful.

Further as Commenter NATOA notes, the Commission has declined to comment in the FNPRM on this decision wherein “the Court expressly rejected arguments that the Cable Act or the amendments thereto in the Telecommunications Act preempt LFAs from imposing fees or other regulations on the non-cable services provided by cable operators. Nothing in the FNPRM addresses the clear reasoning of this decision.”[39] The second FNPRM proposes rules that would have the effect of preempting a state law that has been specifically upheld by the state’s supreme court. The Commission has not explained why it has the authority to apply federal preemption in this circumstance.

K. The Commission Should Not Extend These Proposed Rules to State Franchises.

There are inadequate grounds in the record to extend these rules to state level franchises. Commenter Verizon’s suggestion that consistency in regulations will further broadband deployment,[40] is an unsupported and inadequate justification for ignoring state authority.

As commenter the City Coalition explained, this is a matter of state policy, and variations between state laws may mean that the Commission’s proposals would have unintended consequences.[41] The Commission’s proposal does not adequately contemplate the balance of policies that states have reached in crafting state franchise legislation.

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[39] NATOA et al. Comments, Docket No. 05-311, p. 20.

[40] Verizon Comments, Docket No. 05-311, p. 9.

[41] The City Coalition Comments, Docket No. 05-311, p. 26.“Illinois is only one of several states with statewide franchising. Each state with such a system will have made its own policy decisions regarding franchising and each of these policy decisions will have different effects if the Second FNPRM is adopted. It is unreasonable to expect the Commission to be able to account for the various differences among these policies and craft a solution that is workable, especially when Congress never intended for the Commission’s cable in-kind or mixed-use rulings to be applied as outlined in the Second FNPRM. Neither should be adopted and neither should be extended to statewide franchise laws.”

The Commission should not overturn the balance of policies reflected in in state franchising laws. For example, New Jersey adopted a state franchising law in 2006.[42] Under this law, cable companies can continue negotiating franchises with each New Jersey municipality or can choose to undertake the process outlined by the statutes to obtain a "systemwide" franchise.[43] The state law reflects a carefully considered set of policy choices. Some requirements of a state level franchise for example are statewide build-out requirements, an increase in the rate of franchise fees, payment into a fund to provide basic tier service to the elderly, and PEG requirements.[44] If the Commission expands its proposed rules to cover state wide franchising laws, not only would it be running roughshod over these policies, it would implicate questions of federalism.

Finally, as commenter Anne Arundel County, Maryland, et al. suggests, there is an inadequate factual basis to extend the Commission's proposals to state franchises without, at minimum, further notice about the impact of these proposals on state level franchises.[45]

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[42] State Cable Television Act, N. J. Rev. Stat. 48:5A-1 et. seq. (2006).

[43] *See* N. J. Board of Public Utilities, *In The Matter Of Verizon New Jersey, Inc. Certification Of Capability To Provide Cable Television Service To 60 Percent Of Households In Five Designated Municipalities*, Order, Docket No. CO11010031, (2011).

[44] James G. Parker, *Statewide Cable Franchising: Expand Nationwide or Cut the Cord?* 69 Fed. Comm. L. J, 199, 208-209 (2011).

[45] Anne Arundel County, Maryland, et al. Comments, Docket No. 05-311, pp. iii-iv; pp. 47-78. "Finally, the Commission seeks comment on whether to apply these problematic interpretations to cable franchises in states that adopted state-level franchising. While the Commission's existing interpretations are a poor fit for locally granted franchises, they are especially troublesome when the franchise is mandated by state law. State franchises, crafted by industry, were often adopted in the name of facilitating competitive entry into cable services, but often use terms that are broader to those in the Cable Act, such a granting franchises to video iv service providers, not just cable operators. Imposing the Commission's existing interpretations would void the existing state trade-offs and put localities in an impossible position. Moreover, without a more sound factual understanding of state franchises, the Commission's proposals are so vague as to require, at a minimum, a further notice to explain what the application of these policies would mean for state-level franchises." "Further, because of the complexity and differences among the many state statutes that have been drafted, the Commission does not yet have a record that would even support a notice of proposed rulemaking on this topic. The proposals in the instant FNPRM are so vague as to be impossible to understand how they would apply to the vast majority of state statutes. At a minimum a further notice would be necessary in order to provide adequate notice for local governments seeking to understand how the Commission would apply previous rulings to state franchises."

L. <u>The Commission Should Not Rely on Vague Allegations Against Unnamed Jurisdictions.</u>

While we commend NCTA for identifying some localities whose practices with whom it took issue, it also made allegations against unnamed entities regarding "abusive local franchising practices".[46] ACA also called out "outlier" LFAs who "have sought or are seeking to add fees and regulations."[47] The Commission should not rely on complaints against unnamed jurisdictions to substantiate allegations that local governments are impeding deployment because reliance on anonymous complaints is not only misplaced; it violates fundamental principles of due process. Due Process and fundamental fairness require that an entity alleged to be conducting "bad acts" be identified and provided an opportunity to respond.

III. Conclusion

The Local Governments see nothing in the Comments filed in this Docket which provides clear statutory language supporting preemption of traditional areas of local and state government authority and changing the interpretations of the Cable Act that have been in place since 1984. Additionally, some of the authority cited by the cable associations is either not applicable and/or currently being reviewed by the courts. For example, Commenter ACA cites the Commission's *Restoring Internet Freedom* Order,[48] and Commenter NCTA cites the Commission's Wireless

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[46] NCTA Comments, Docket No. 05-311, p. 58.

[47] ACA Comments, Docket No. 05-311, p. 10. "Unfortunately, there are "outlier" LFAs that have sought or are seeking to add fees and regulations regardless of statutory prohibitions" speaking in context of managing non cable services in ROW."

[48] ACA Comments, Docket No. 05-311, p. 14.

Order,[49] which are both being appealed as impermissible statutory constructions of the Communications Act, among other arguments.[50]

There is no evidence of a widespread national problem demanding a federal agency fix. The existing status quo is working, cable operators are using the rights of way, LFAs are receiving franchise fees and other franchise considerations as bargained for and consistent with the Cable Act. Changing the regulatory framework is unnecessary and unsupported even by the industry. We urge the Commission to listen to the thousands of comments from municipalities, counties, access organizations and citizens urging no action by the Commission weighed against the three comments submitted by one cable operator and two associations. The Commission should respect the will of the American citizens, and these citizens both individually and by their elected local governments have spoken – the proposed rules are unnecessary and will deprive local governments of their statutorily granted rights.

Respectfully submitted,

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[49] NCTA Comments, Docket No. 05-311, p. 23.

[50] *See* Mozilla Corp. et al. v. FCC No. 18-1051 (Feb. 22, 2018); City of Seattle et al. v. FCC, No. 18-9571 (Nov. 9, 2018).

On behalf of: The Association of Washington Cities; the Washington State Association of Counties; the Colorado Communications and Utility Alliance; the Cities of Everett, Kent, Lacey, Olympia and Tumwater, Washington; Thurston County, Washington; the Rainier Communications Commission and the Jersey Access Group.